A

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as Syarikat Teratai KG Sdn Bhd)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–1009 OF 2003

GOPAL SRI RAM, JAMES FOONG AND ZULKEFLI MAKINUDINJJCA

29 OCTOBER 2005

C

Civil Procedure — Appeal — Appeal to Federal Court — Court of Appeal not exercising appellate jurisdiction in respect of matter originating from High Court — No appeal from decision of Court of Appeal refusing leave to appeal — Whether appeal to Federal Court available

D

Civil Procedure — Judgments and orders — Order sought by plaintiff to compel defendant to set aside monies to meet plaintiff's judgment in the event of successful appeal — Application for such order made to Court of Appeal — Whether Court of Appeal could make such order

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F

Civil Procedure — Jurisdiction — Court of Appeal — Whether Court of Appeal empowered to restrain party from disposing assets pending judgment — Courts of Judicature Act 1964, s 44

G

Civil Procedure — Jurisdiction — Court of Appeal — Interim preservation of property — Whether Court of Appeal seised with jurisdiction to restrain party from disposing assets pending judgment — Whether such jurisdiction original jurisdiction of Court of Appeal — Courts of Judicature Act 1964, s 44

H

Companies and Corporations — Winding up — Undue preference — Application by plaintiff for order compelling defendant to set aside monies to meet plaintiff's judgment in the event of successful appeal — Whether such order would create special fund in favour of plaintiff's unsecured debt in the event of winding-up — Whether such order would be void against defendant's other unsecured debtors in the event of winding-up — Whether such order would constitute undue preference in plaintiff's favour — Whether court could make such order

I

The plaintiff had in the High Court instituted an action against the defendant for monies allegedly owed to it by the defendant. The plaintiff's claim was in two parts. The first part concerned a liquidated sum of RM65 million whereas the second part was for an unliquidated sum. Although the trial judge found the defendant liable, he

declined to award the sum of RM65 million. Instead he directed damages to be assessed. He also denied the plaintiff the second claim. The estimated value of the plaintiff's claims under both heads was in the region of RM145 million. The plaintiff appealed against both orders whilst the defendant appealed against the finding of liability. The appeals were heard by the Court of Appeal which reserved judgment. The plaintiff then applied to the Court of Appeal to compel the defendant to set aside a sum of not less than RM100 million to meet the plaintiff's judgment. The plaintiff alleged that the defendant was to undergo a restructuring exercise under which its sole and very valuable asset, the right to collect toll, would be charged to the restructuring financiers. Also, a substantial portion of the monies obtained from the financing, apparently was to be utilised to pay dividends to the defendant's shareholders. The plaintiff was thus concerned that it would be left with a paper judgment, assuming it succeeded in the appeals. The plaintiff contended that the Court of Appeal was empowered to allow its application on the basis of s 44 of the Courts of Judicature Act 1964 ('CJA') and the English Court of Appeal decision in*Polly Peck International Plc v Nadir (No 2)* [1992] 2 Lloyd's Rep 238 (*Polly Peck*).

Held, refusing such order but instead ordering the defendant not to dispose assets up to RM100 million:

(1) In granting the injunction, the Court of Appeal was exercising its original jurisdiction under s 44 of the CJA. In the instant case, the appeals by both sides had been heard and judgment reserved. All that remained was the giving of the decision and reasons for it. There was no appeal pending before the Court of Appeal. The Court of Appeal was asked to act under s 44 of the CJA to grant interim protection pending the giving of its decision. That was an invitation to exercise original jurisdiction and the Court of Appeal could exercise it because of s 44: *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113 referred; *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 not followed (see para 4).

(2) Since the Court of Appeal was not exercising appellate jurisdiction in respect a matter that originated in the High Court, an appeal to the Federal Court was not available in the instant case. Similarly, there is no appeal from a decision of the Court of Appeal refusing leave to appeal: *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 referred. If the Court of Appeal had been exercising its appellate jurisdiction in respect of a matter that originated in the High Court, the situation might have been different. In that event an appeal to the Federal Court would be competent despite the decisions in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 (see para 5).

(3) Section 44 of the CJA is indeed widely drafted. It enables the Court of Appeal to make any form of interim preservation order that would prevent prejudice to a party's claim. However, in the instant case if the Court of Appeal were to direct the defendant to set aside or to earmark a sum of RM100 million, that would be an ineffective order. This was because the relationship between the plaintiff and defendant was one of judgment creditor and debtor. In fact, the plaintiff was an unsecured creditor. The Court of Appeal's order would then

A have the effect of creating a special fund in the plaintiff's favour to meet his unsecured debt. This would be an undue preference in the plaintiff's favour and the order would accordingly be void against the defendant's other creditors in the event of a winding up. Although on the facts, there was no insolvency as yet, the question to be asked is a hypothetical question. Section 44 of the B CJA therefore did not authorise the Court of Appeal to make the order sought by the plaintiff: *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 followed (see paras 10 and 11).

(4) The facts in *Polly Peck* could be distinguished from the facts in the instant case. In *Polly Peck* the plaintiff was the beneficial owner of the monies diverted by C the first defendant. Therefore it had a right in equity to trace the whole or any part of it into the hands of a third party. Once the money was found, Polly Peck as the true owner could compel the earmarking of part of its money that had come into the third party's hands. In the instant case, the relationship between the plaintiff and defendant was one of creditor and debtor. It was not that of fiduciary and beneficiary. Whatever monies the defendant had belonged D to it and not to the plaintiff. All that the plaintiff had was a judgment which it could execute at the appropriate time (see para 15).

(5) In the instant case, the facts cried out for interim protection of the plaintiff's accrued rights. Serious allegations of fact had been made by the plaintiff. The E defendant merely denied some of these allegations in general terms. The defendant had not been forthcoming with facts that were peculiarly within its knowledge. There had been a singular lack of candour. Section 44 of the CJA clearly empowered the Court of Appeal to make the order it made — restraining the defendant from disposing or dissipating its assets up to RM100 million (see para 16).

F

Per curiam:

Section 44(1) of CJA uses the words 'in any proceeding'. It does not say 'in any appeal'. Parliament has gone on to clarify the position in the second subsection which deems an application under s 44(1) to be a proceeding. Section 3 CJA defines G 'proceeding' to mean any proceeding whatsoever of a civil or criminal nature and 'includes an application at any stage of a proceeding'. When the Court of Appeal makes an order under s 44 (1) of the CJA it does not deal with the appeal proper at all. Hence it is an original jurisdiction, albeit a very limited one (see para 3).

H **[Bahasa Malaysia summary**

Plaintif telah memulakan tindakan di Mahkamah Tinggi terhadap defendan bagi mendapatkan wang yang dikatakan dihutang oleh defendan. Tuntutan plaintif adalah terdiri daripada dua bahagian. Bahagian pertama adalah berkenaan dengan jumlah I yang boleh dikira sebanyak RM65 juta dan bahagian kedua pula adalah jumlah yang tidak dapat ditentukan. Walaupun hakim bicara memutuskan bahawa defendan bertanggungjawab, beliau menolak untuk memberikan award sebanyak RM65 juta. Sebaliknya, beliau mengarahkan agar gantirugi dinilai. Beliau juga tidak membenarkan tuntutan kedua plaintif. Anggaran nilai tuntutan plaintif bagi kedua-dua bahagian adalah sekitar RM145 juta. Plaintif merayu terhadap kedua-dua

perintah dan defendan merayu terhadap keputusan bahawa defendan bertanggungjawab. Rayuan-rayuan tersebut telah didengar dalam Mahkamah Rayuan yang telah merezabkan penghakiman. Plaintif kemudiannya telah membuat permohonan kepada Mahkamah Rayuan untuk memaksa defendan untuk mengetepikan sejumlah wang yang tidak kurang daripada RM100 juta bagi memenuhi penghakiman plaintif. Plaintif mendakwa bahawa defendan pada masa itu akan melalui proses pengstrukturan semula yang mana hak defendan untuk memungut tol, satu-satunya hak defendan yang amat bernilai, akan dicagarkan kepada pembiaya pengstrukturan semula. Selain itu, sejumlah besar wang yang diperolehi daripada pembiayaan tersebut akan digunakan untuk membayar dividen kepada pemegang-pemegang saham defendan. Plaintif bimbang bahawa plaintif hanya akan mendapat kertas penghakiman, sekiranya ia berjaya dalam rayuannya. Plaintif menyatakan bahawa Mahkamah Rayuan mempunyai kuasa untuk membenarkan permohonannya berdasarkan s 44 Akta Mahkamah Kehakiman 1964 ('AMK') dan keputusan Mahkamah Rayuan Inggeris dalam kes*Polly Peck International Plc v Nadir (No 2)* [1992] 2 Lloyd's Rep 238 (*Polly Peck*).

Diputuskan, menolak perintah tersebut dan memerintahkan defendan untuk tidak membelanjakan harta bernilai sehingga RM100 juta:

(1) Dalam memberikan injunksi, Mahkamah Rayuan telah menjalankan bidangkuasa asalnya di bawah s 44 AMK. Dalam kes ini, rayuan-rayuan daripada kedua-dua belah pihak telah didengar dan penghakiman telah direzabkan. Apa yang tinggal adalah untuk memberi keputusan dan sebab-sebabnya. Tiada rayuan yang tertangguh dalam Mahkamah Rayuan. Mahkamah Rayuan telah diminta untuk bertindak di bawah s 44 AMK untuk memberikan perlindungan interim sementara menunggu keputusan. Ini adalah satu jemputan untuk menggunakan bidangkuasa asal dan Mahkamah Rayuan boleh menggunakannya disebabkan s 44: *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113 dirujuk; *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 tidak diikut (lihat perenggan 4).

(2) Memandangkan Mahkamah Rayuan tidak menggunakan bidangkuasa rayuan berkenaan dengan perkara yang berasal daripada Mahkamah Tinggi, rayuan kepada Mahkamah Persekutuan tidak boleh dibuat dalam kes ini. Begitu juga, tidak terdapat rayuan berkenaan dengan keputusan Mahkamah Rayuan yang menolak untuk memberikan kebenaran untuk membuat rayuan: *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 dirujuk. Sekiranya Mahkamah Tinggi telah menjalankan bidangkuasa rayuannya berkenaan dengan perkara yang berasal daripada Mahkamah Tinggi, keadaan mungkin akan jadi berbeza. Sekiranya begitu, rayuan kepada Mahkamah Persekutuan adalah kompeten walaupun adanya keputusan dalam kes *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 dan *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 (lihat perenggan 5).

(3) Seksyen 44 AMK adalah sememangnya dideraf secara meluas. Ia membolehkan Mahkamah Rayuan untuk membuat pelbagai perintah pemeliharaan interim yang boleh mengelakkan berlakunya sebarang prejudis kepada tuntutan sesuatu pihak. Walau bagaimanapun, dalam kes ini, sekiranya Mahkamah

Rayuan membuat arahan kepada defendan untuk memperuntukkan RM100 juta, ianya tidak akan menjadi satu perintah yang berkesan. Ini adalah kerana, hubungan di antara plaintif dan defendan adalah sebagai pemiutang dan penghutang. Malah, plaintif adalah pemiutang tak bercagar. Perintah Mahkamah Rayuan akan mengakibatkan wujudnya dana khas bagi plaintif untuk memenuhi hutang tidak bercagarnya. Ini akan memberi satu pengaruh tak wajar berpihak kepada plaintif dan dengan itu perintah tersebut adalah terbatal terhadap pemiutang-pemiutang defendan sekiranya terdapat penggulungan. Walaupun berdasarkan fakta-fakta, masih belum terdapat ketaksolvenan, soalan yang ditanya adalah berbentuk andaian. Seksyen 44 AMK tidak memberi kuasa kepada Mahkamah Rayuan untuk memberi perintah yang dipohon oleh plaintif: *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 diikut (lihat perenggan 10 dan 11).

(4) Fakta dalam *Polly Peck* boleh dibezakan daripada fakta dalam kes ini. Dalam kes *Polly Peck*, plaintif adalah pemilik benefisial kepada wang yang dialihkan oleh defendant. Oleh itu, ia mempunyai hak dalam ekuiti untuk menjejak kesemua atau sebahagian daripadanya ke pihak ketiga. Apabila wang tersebut dijumpai, *Polly Peck* sebagai pemilik sebenar boleh membuat pengenepian sebahagian duit yang telah berada dalam milikan pihak ketiga. Dalam kes ini, hubungan di antara plaintif dan defendan adalah sebagai pemiutang dan penghutang. Ianya bukanlah sebagai fidusiari dan benefisiari. Sebarang wang yang ada pada defendan adalah dimiliki oleh defendan dan bukannya plaintif. Apa yang dimiliki oleh plaintif hanyalah satu penghakiman yang boleh dilaksanakan pada masa yang sesuai (lihat perenggan 15).

(5) Dalam kes ini, fakta-fakta menunjukkan perlunya perlindungan interim terhadap hak-hak terakru plaintif. Tuduhan serius berkenaan fakta telah dibuat oleh plaintif. Defendan hanyalah menafikan sebahagian daripada tuduhan tersebut secara umum. Defendan tidak memberitahu fakta-fakta yang diketahuinya. Terdapat kurang sikap terus terang. Seksyen 44 AMK dengan jelasnya memberi kuasa kepada Mahkamah Rayuan untuk membuat arahan yang telah diberikannya — melarang defendan daripada membelanjakan atau menghabiskan hartanya sehingga RM100 juta (lihat perenggan 16).

Per curium:

Seksyen 44(1) menggunakan perkataan 'in any proceeding'. Ia tidak menyatakan 'in any appeal'. Parlimen telah menjelaskan bahawa sub-seksyen kedua yang menganggap pemakaian di bawah s 44(1) sebagai satu prosiding. Seksyen 3 AMK mendefinisikan 'proceeding' sebagai sebarang prosiding sivil atau jenayah dan termasuk permohonan pada sebarang tahap prosiding tersebut. Apabila Mahkamah Rayuan memberi perintah di bawah s 44(1) AMK ia tidak berkenaan dengan rayuan yang sebenarnya. Oleh itu, ia adalah bidangkuasa asal, walaupun sangat terhad.]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 680–684.

For cases on judgment and orders generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 249–456.

For cases on jurisdiction of the court, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3902–3908.
For cases on undue preference, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1354.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Banque Belge v Hambrouck [1921] 1 KB 321 (refd)
Capital Insurance Bhd v Aishah bte Abdul Manap & Anor [2000] 4 MLJ 65
Foskett v McKeown [2000] 3 All ER 97 (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Polly Peck International Plc v Nadir (No 2) [1992] 2 Lloyd's Rep 238 (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd [2002] 4 MLJ 113 (refd)
Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 44, 44(1)
Rules of the High Court 1980 O 29 r 2

Appeal from: Suit No D5–22–110 of 1995 (High Court, Kuala Lumpur)

Cyrus Das (Benjamin Dawson with him) (Noraisyah & Co) for the appellant.
Muhammad Shafee Abdullah (Kaushalya a/p Rajathurai with him) (Shahrizat Rashid & Lee) for the respondent.

Gopal Sri Ram JCA:

[1] We heard this motion on 24 October 2005 and reserved our decision on it to the following day. We did not grant the orders sought. But we granted an injunction on the usual terms restraining the respondent (whom I shall refer to as the defendant) and/or its servants or agents or whosoever otherwise from dealing with or disposing of its assets, including any monies it may receive hereafter, up to a limit of RM100 million until further order. After we had made the order, learned counsel for the defendant sought a stay of our order because he wishes to test the correctness of our decision before the Federal Court.

[2] We are here exercising our original jurisdiction under s 44 of the Courts of Judicature Act 1964 ('CJA'). See *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113. I am aware that in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 Dzaiddin FCJ remarked by way of obiter that: 'It is trite that the Court of Appeal today no longer has any original jurisdiction'. That, with respect, is too wide and is an incorrect observation. It overlooks the actual wording of s 44 which reads:

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under sub-s (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under sub-s (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.

[3] It is important to notice that s 44(1) uses the words 'in any proceeding'. It does not say 'in any appeal'. Parliament has gone on to clarify the position in the second subsection which deems an application under s 44(1) to be a proceeding. And s 3 CJA defines 'proceeding' to mean any proceeding whatsoever of a civil or criminal nature and 'includes an application at any stage of a proceeding'. So, when this court makes an order under CJA s 44(1) it does not deal with the appeal proper at all. Hence it is a original jurisdiction, albeit a very limited one.

[4] Take this very case. The appeals by both sides have been heard and judgment reserved. All that remains is the giving of the decision and reasons for it. There is therefore no appeal pending before this court. We are asked to act under s 44 to grant interim protection between now and the date on which our decision will come. That, with respect is an invitation to exercise original jurisdiction and we can exercise it because of s 44.

[5] Since we are not exercising appellate jurisdiction in respect a matter that originated in the High Court, an appeal to the Federal Court is not available. Similarly, there is no appeal from a decision of this court refusing leave to appeal. See *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549. It may have been different if we had been exercising our appellate jurisdiction in respect of a matter that originated in the High Court. In that event an appeal to the Federal Court would, in my respectful view, be competent despite the decisions in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65. This is because doubt has been cast over these cases by the majority judgments in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. Also, because, in my respectful view, both *Lam Kong* and *Capital Insurance* were wrongly decided and the dissent of Chong Siew Fai CJ (Sabah & Sarawak) in *Lam Kong* is correct.

[6] So, in the ordinary way, in a case of this kind we would not write a judgment unless the Federal Court requires it for purposes of deciding whether to grant leave. But this application raises an important point of law. It has to do with the power of this court to protect the rights of a plaintiff who has a judgment in his favour to ensure that his judgment is not rendered useless pending either an appeal or pending decision on an appeal. So far as I am aware, that point has not been decided in any other case. A judgment is accordingly called for.

[7] The applicant — and I shall refer to it as the plaintiff — brought an action for monies allegedly owed it by the defendant under the terms of one of a series of interlocking agreements. The plaintiff's claim was in two parts. First, for a liquidated sum of RM65 million and, second, for an unliquidated sum. The trial judge found the defendant liable. But he declined to award the sum of RM65 million. Instead he directed damages to be assessed. He also denied the plaintiff the second claim. The plaintiff appealed against both orders whilst the defendant appealed against the finding of liability. These appeals were heard a few weeks ago by a differently constituted Bench of which my learned brother Zulkefli Makinudin JCA and I were also members. After hearing argument we reserved judgment. The estimated value of the plaintiff's claims under both heads is in the region of RM 145 million.

[8] The plaintiff had in the meantime filed an application asking for certain orders, which I will briefly refer to in a moment. It did so because it feared that if it succeeded in the appeal, it will be left holding a paper judgment. The plaintiff says that its fear is well grounded. Because, the defendant is about to undergo a restructuring exercise under the terms of which its sole and very valuable asset, the right to collect toll, will be charged to lenders who are financing the restructure. A substantial portion of the monies obtained from the financing will go to pay dividends to the defendant's shareholders. Once that happens, the plaintiff will, says its counsel be left holding on to a worthless piece of paper. I must now say a word about the orders asked for by the plaintiff in its motion.

[9] In essence, what the plaintiff wanted was for this court to 'earmark' funds that will be coming into the defendant's hands. In short, the defendant was to be required to set aside a sum of not less than RM100 million to meet its judgment. Now, can this court grant such an order? Learned counsel for the plaintiff submits that it can. In support he relies on CJA s 44 and the decision of the English Court of Appeal in *Polly Peck International Plc v Nadir (No 2)* [1992] 2 Lloyd's Rep 238.

[10] Counsel for the plaintiff submits that s 44 is widely drafted. True enough. He submits that it enables us to make any form of interim preservation order that will prevent prejudice to his client's claim. Also true. But the power it confers upon us must be exercised in accordance with the general law. In the present instance if we were to direct the defendant to set aside or to earmark a sum of RM 100 million, that would be an ineffective order. I will explain why.

[11] The relationship between the plaintiff and defendant is that of judgment creditor and debtor. Indeed, the plaintiff is an unsecured creditor. The order sought will have the effect of creating a special fund in the plaintiff's favour to meet his unsecured debt. This will be an undue preference in the plaintiff's favour and the order will accordingly be void against the defendant's other creditors in the event of a winding up. For no unsecured creditor may seek to steal a march upon his fellow unsecured creditors to get his hands on the debtor's assets by having a special fund created in his favour out of his debtor's assets. He must, like all his fellow unsecured creditors, join the queue and prove his debt in the debtor's insolvency. Any fund specially created will have to be brought into the debtor's general estate. To this learned counsel answers that there is in fact no insolvency as yet and that the

A defendant is in fact solvent and so no question of preference can arise. But that is not the test for undue preference. The question that is to be is asked is a hypothetical one. What will happen to the fund which the plaintiff now wants to have set up in its favour if the defendant were to be wound up?

B **[12]** As for authority to support the view I have expressed, I need go no further than *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 where, when responding to a similar invitation as here, Raja Azlan Shah CJ (Malaya) said that:

> C the result would be that a plaintiff could require a defendant to set up a special fund to meet a claim not yet proved, or again the effect might be to give the particular plaintiff preference over the other creditors. We would in this connection also refer to the judgment of this court in *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240, 244 (at p 244) and are accordingly unable to take the view that it would be proper in the circumstances to make the order sought by the appellant against the company.

D **[13]** So, s 44, wide though it may be, does not authorise this court to make the order asked for by the plaintiff on its motion. It therefore does not assist the plaintiff to obtain the sought for on the motion.

E **[14]** I now come to *Polly Peck International Plc v Nadir* upon which learned counsel places much reliance. That case concerned a director who had, in alleged breach of his fiduciary duties, siphoned out money belonging to the company. Some of these funds, amounting to £8.9 million, found their way into the hands of the Central Bank of the Turkish Republic of Northern Cyprus. The company commenced an action in which it sought to trace the funds diverted by the director. It applied for F a Mareva injunction against the Central Bank which was granted at first instance. The Court of Appeal dissolved that injunction and in its place made an order for the interim preservation of property under O 29 r 2 which is in pari materia with RHC O 29 r 2. Counsel cited to us the following passage in the judgment of Scott LJ, which he said concluded the point in his client's favour in the present instance:

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> The Central Bank should be required, first, to earmark the £8.9m in a separate account and, second, should be restrained from dealing with the earmarked fund otherwise than in the normal course of business and unless and to the extent that there are no other funds in England available to be used. The Central Bank should be required to inform PPI's solicitors in advance of any use proposed to be made of the £8.9m and, at the same time, to give details of all foreign currency reserves for the time being held in this country. Save as H aforesaid I would allow the appeal and discharge the Mareva injunction.

[15] Counsel says that if an 'earmarking order' could be made in *Polly Peck*, there was no reason why this court could not make a similar order here. He puts his case I in this way. Polly Peck had no judgment in its favour. Yet it was entitled to an earmarking order. Here, his client, the plaintiff, has a judgment and is therefore in a much stronger position than *Polly Peck*. It is therefore entitled to have an earmarking order of up to a limit of RM100 million. With respect, I am unable to agree. The facts of *Polly Peck* and this case are far apart. In *Polly Peck*, the plaintiff was the beneficial owner of the monies diverted by the first defendant, Nadir. Therefore it

had a right in equity to trace the whole or any part of it into the hands of a third party; in that case the Central Bank. See *Banque Belge v Hambrouck* [1921] 1 KB 321; *Foskett v McKeown* [2000] 3 All ER 97. Once the money was found, Polly Peck as the true owner could compel the earmarking of part of its money that had come into the Central Bank's hands. But that is not the case here. The relationship between the plaintiff and defendant is one of creditor and debtor. It is not that of fiduciary and beneficiary. Whatever monies the defendant has belongs to it and not to the plaintiff. All that the plaintiff has is a judgment which it may execute at the appropriate time. Accordingly, *Polly Peck* does not assist the plaintiff.

[16] That said, it is clear from the affidavits filed on the motion before us, without prejudging the merits of the appeal, that the facts cry out for interim protection of the plaintiff's accrued rights. Serious allegations of fact have been made in the plaintiff's affidavit in support of its motion. The defendant has merely denied some of these allegations in general terms. But it has not been forthcoming with facts that are peculiarly within its knowledge. In short, there has been a singular lack of candour. Reading the affidavits leaves one with the clear impression that the plaintiff requires interim protection until this court hands down its judgment. That being the case we made the order referred to earlier in this judgment.

[17] Our order merely restrains the defendant from disposing or dissipating its assets up to RM100 million. This is merely in the form of a post judgment Mareva injunction that provides the plaintiff the much needed interim protection until further order. In my judgment, s 44 amply empowers us to make the order we made. The interests of justice demand it. We also ordered that the costs of the motion abide by the event of the appeal. After we had granted the injunction, counsel for the defendant moved for a stay of our order. That application was refused.

[18] My learned brother Zulkefli bin Ahmad Makinudin JCA has seen this judgment in draft and has expressed his agreement with it.

James Foong JCA:

[19] I have read the draft judgment of my learned brother, Justice Gopal Sri Ram. Though we both agreed to the conclusion arrived at and the material part of the contents therein, I am not in favour of the approach adopted in respect of how the Court of Appeal's jurisdiction is secured in dealing with this application of the appellant before us.

[20] By the scare doctrine of *'Staris Decisis'* the common law in this country has developed much in line with that inherited from the mother of common law — England. This means that the ratio decidendi from a judgment or decision of a more superior court is binding on all later courts under the system of judicial precedent. This is trite law.

[21] I therefore feel that the Federal Court's decision in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v Aishah bte Abdul*

Manap & Anor [2000] 4 MLJ 65, in declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under s 44 of the Courts of Judicature Act to deal with 'any proceedings pending before the Court of Appeal' is binding on this court. The dissenting view of Chong Siew Fai (CJ Sabah & Sarawak) in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* over this point cannot be accepted as the correct state of law over the majority judgment of two other Federal Court judges who sat on that case.

[22] In this instant case, I am of the view that since there is a pending proceeding before of this court where the decision in the appeal proper has yet to be delivered, though the appeal was argued, this court is clothe with jurisdiction to hear this Notice of Motion brought by the appellant for our consideration.

[23] By this provision, I approached this motion and arrived at the conclusion which is similar to those of my other two brother judges in ordering the defendant be restrained from disposing or dissipating its assets up to RM100 million.

Order refused. Defendent ordered not to dispose asset up to RM100 million.

Reported by John Paul Simon